

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

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<b>APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 43C 30151928 BY LINCOLN AND JUDITH POWERS</b>	) ) )	<b>PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
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On April 9, 2021, Lincoln P. and Judith A. Powers (Applicant) submitted Application for Beneficial Water Use Permit No. 43C 30151928 to the Billings Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 1.2 CFS and 29.82 AF. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of September 20, 2021. The Department had a pre-application meeting with the Applicant on April 8, 2021. Mark Elison, Chris Schweigert and Jill Lippard were present for the Department, Lincoln Powers was present for the Applicants. An Environmental Assessment for this Application was completed on November 5, 2021.

**INFORMATION**

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
  - Reservoir/Place of Storage Addendum
- Maps: Undated aerial imagery from Google Earth showing proposed point of diversion, means of conveyance and place of use.

Information within the Department's Possession/Knowledge

- DNRC water right records

- USGS Stream gaging records for East Rosebud Creek gage no. 06203500 with a period of record from 10/1921 through 8/1924.
- Weather station records from the Columbus, Montana station no. 241938 with a period of record from 1930 through 2012 from the Western Regional Climate Center online at <https://wrcc.dri.edu/cgi-bin/cliMAIN.pl?mt1938>
- Monthly evaporation estimates based on data from 1981 through 2010 adjusted to 75% of Penman/Linacre (P/L) in Potts.
- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Billings Regional Office at 406-247-4415 to request copies of the following documents.
  - Technical Memorandum: Physical Availability of Surface Water with Gage Data dated November 1, 2019
  - Technical Memorandum: Pond and Wetland Evaporation/Evapotranspiration dated November 8, 2019
  - Estimation of Evaporation from Shallow Ponds & Impoundments in Montana

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA). **NOTE:** Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; and POD means point of diversion.

### **PROPOSED APPROPRIATION**

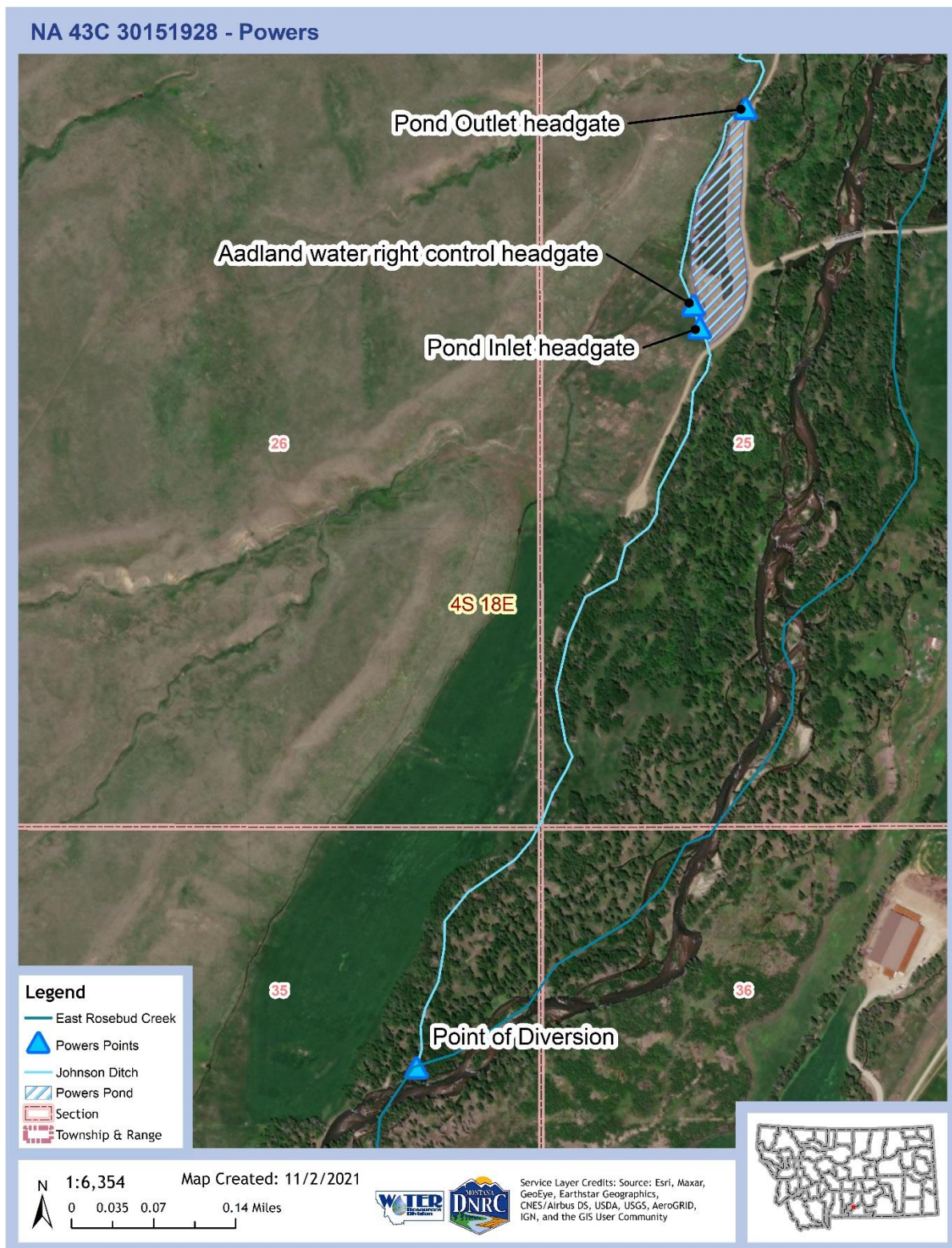
#### **FINDINGS OF FACT**

1. The Applicant proposes to divert water from the East Rosebud Creek, by means of a headgate, from July 1 to September 30 at 1.2 CFS up to 29.82 AF, from a point in the S2NENE Sec. 35, T4S, R18E, for fishery and recreation use from January 1 to December 31. The place of

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use is a reservoir on Lots 3 and 4 COS 355737 Aspen Meadows Ranch Subdivision in the NWSW and SWNW Sec. 25, T4S, R18E, Stillwater County. The project is generally located approximately 4 miles south of Absarokee, MT. The volume requested differs from what was written in the Technical Report because the evaporation calculation by the Department was adjusted. The proposed diversion and conveyance are the existing headgate and canal known as Johnson Ditch.

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**§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA**

**GENERAL CONCLUSIONS OF LAW**

2. The Montana Constitution expressly recognizes in relevant part that:
  - (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
  - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
  - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
  - (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .
3. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding

must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth

in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

4. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further

compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

5. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court,

*Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

6. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.



7. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

**Physical Availability**  
**FINDINGS OF FACT**

8. The Department used the USGS record for gage no. 06203500 for East Rosebud Creek at Roscoe, MT with a period of record from October 1921 through August of 1924. This gage is approximately 8 miles upstream of the proposed diversion and has the longest period of record for any gage on the source. ARM 36.12.1702 requires the Department to use stream gaging records if they are available. Below is the median of the mean monthly flow recorded at the gage throughout the proposed period of diversion.

**Table 1. Median of the mean monthly flow (CFS)**

<b>Month</b>	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>
<b>Flow Rate (CFS)</b>	705.4	269.3	178.15

9. There are 13 water rights above the gage that were appropriated after the period of record. These rights total 18.66 CFS throughout the proposed period of diversion and were subtracted from the median of the mean monthly flow to estimate the amounts available at the gage today.

**Table 2. Adjusted median of the mean monthly flow (CFS)**

<b>Month</b>	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>
<b>Median of the mean monthly flow from gage (CFS)</b>	705.4	269.3	178.15
<b>Demands above gage (CFS)</b>	18.66	18.66	18.66
<b>Adjusted median of the mean monthly flow (CFS)</b>	686.74	250.64	159.49

10. Between the gage and the proposed POD there are 34 diverted legal demands during the proposed period of diversion totaling 92.41 CFS and 1,693.50 AF per year. The FWP instream

flow reservation was not included in the physical availability analysis because it is not diverted. The following table shows the diverted legal demands below the gage and above the POD.

**Table 3. Legal demands between gage and POD**

<b>Water Right Number</b>	<b>Owners</b>	<b>Flow Rate (CFS)</b>	<b>Volume (AF)</b>
43C 12165 00	GEORGETTE K GEE	1.36	115.92
43C 111457 00	SHARP, GEORGE J TRUST; SHARP, MARIAN K TRUST	1.84	157.78
43C 45570 00	RIVER RUN RANCH LLC	1.93	183.38
43C 12157 00	GATES LIMOUSIN RANCH LLC; OSTRUM, DONALD C BYPASS TRUST; OSTRUM, JEANETTE A TRUST	1.93	164.22
43C 45572 00	DENNIS R HOSSFELD; KATHERINE J HOSSFELD; TP RSBD LLC	2.5	107.87
43C 100854 00	JERI M FERSTER; MARK D FERSTER; RICHARD W FERSTER; RONALD G FERSTER	3.03	257.60
43C 100855 00	PEGGY YOUNG; RICHARD YOUNG	3.03	262.50
43C 12158 00	ESPELAND RANCHES LLC	3.03	392.84
43C 30145662	BEVERLY S HEREM; LORETTA L HEREM; ROSEMARIE E HEREM; ANN E PARKER; GORDON D PARKER; MARYALICE H SCHOTT	3.56	266.25
43C 179715 00	EGGEN INC	4.02	397.50
43C 30116164	BENCH RANCH, LLC; BOBE O LLC; AUSTIN R FRANK	4.07	493.11
43C 189833 00	MARGARET C ARTHUN; WRAAL S ARTHUN; BENCH RANCH, LLC	4.83	383.18
43C 102950 00	SHARP, GEORGE J TRUST; SHARP, MARIAN K TRUST	6.25	557.32
43C 12259 00	MARGARET C ARTHUN; WRAAL S ARTHUN; BENCH RANCH, LLC	11.4	949.90
43C 38095 00	JERI M FERSTER; MARK D FERSTER; RICHARD W FERSTER; RONALD G FERSTER	0.08	12.58
43C 111456 00	JERI M FERSTER; MARK D FERSTER; RICHARD W FERSTER; RONALD G FERSTER	0.06	12.40
43C 100842 00	SHARP, GEORGE J TRUST; SHARP, MARIAN K TRUST	0.00	2.87

43C 43373 00	HUCKE FAMILY TRUST	0.25	6.00
43C 48688 00	TP RSBD LLC	2.60	1617.00
43C 48689 00	EGGEN INC	0.04	5.90
43C 100833 00	C J HUCKE; DOUGLAS C HUCKE; HUCKE FAMILY CABIN TRUST; JENNIFER H MOLLER; CAROL H MOORE; LYNNE M PINNICK	0.25	6.00
43C 43448 00	ETHEL FINLEY; ROD FINLEY; JOHN P SIMMONS; MARILYN J SIMMONS	0.4	30.00
43C 100837 00	BANJO LLC	2.22	50.00
43C 48686 00	DANIEL A AADLAND; EMILY M AADLAND	0.38	75.00
43C 15684 00	BENCH RANCH, LLC	9.6	152.06
43C 30017728	JERI M FERSTER; MARK D FERSTER; RICHARD W FERSTER; RONALD G FERSTER	1.14	208.00
43C 12165 00	OLTROGGE, SHARLENE E REVOCABLE TRUST	5.3	212.00
43C 111457 00	SHARP, GEORGE J TRUST; SHARP, MARIAN K TRUST	1.88	222.75
43C 45570 00	BRANDT RANCH LLC	1.33	240.00
43C 12157 00	PEGGY J FERSTER; RONALD G FERSTER	1.59	292.00
43C 45572 00	OSTRUM, DONALD C BYPASS TRUST; OSTRUM, JEANETTE A TRUST	1.59	300.00
43C 100854 00	JERI M FERSTER; MARK D FERSTER; RICHARD W FERSTER; RONALD G FERSTER	3.03	334.00
43C 100855 00	ESPELAND RANCHES LLC; SHARP, GEORGE J TRUST; SHARP, MARIAN K TRUST	1.64	424.00
43C 12158 00	RIVER RUN RANCH LLC	6.25	1250.00

11. To determine the amount of water physically available at the POD the Department subtracted the diverted legal demands below the gage and above the POD from the adjusted median of the mean monthly flow rate and volume. The monthly volume is calculated as the flow rate in CFS times 1.98 times the number of days per month. Volumes for legal demands are broken down by month based on the total volume and the number of months in the period of diversion.

Table 4. Physical Availability (CFS)

	July	August	September
<b>Adjusted Median of Mean Monthly Flow</b>	686.74	250.64	159.49
<b>Legal Demands Between Gage and POD</b>	92.41	92.41	92.41
<b>Physically Available at POD (Median Minus Legal Demands)</b>	594.33	158.23	67.08

Table 5. Physical Availability (AF)

	July	August	September
<b>Median of Mean Monthly Volume*</b>	42,152.10	15,384.28	9,473.71
<b>Legal Demands Between Gage and POD</b>	1,693.50	1,693.50	1,693.50
<b>Physically Available at POD (Median Minus Legal Demands)</b>	40,458.60	13,690.78	7,780.21

\*Calculated as flow in CFS times 1.98 times the number of days each month

## CONCLUSIONS OF LAW

12. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

13. It is the applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

14. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application*

*for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson (DNRC Final Order 1990); In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean (DNRC Final Order 1994).*

15. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony (DNRC Final Order 2001).*

16. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 8-11)

**Legal Availability:**

**FINDINGS OF FACT**

17. The area of potential impact for this application is approximately 3 miles downstream to the mouth of East Rosebud Creek at Rosebud Creek. This area includes the entire length of East Rosebud Creek below the proposed point of diversion. Rosebud Creek is a significant hydrologic boundary where the contributing drainage area more than doubles.

18. The following existing water rights may be affected by the proposed appropriation.

**Table 6. Existing legal demands on East Rosebud Creek downstream of proposed POD**

Water Right Number	Owners	Flow Rate (CFS)	Volume (AF)
43C 30017728*	MONTANA, STATE OF DEPT OF FISH WILDLIFE & PARKS	732.30	115,372.00
43C 130352 00	KARL O GAUSTAD; GOODELL TRUST; WENDELIN L MITCHELL; JAMES JUSTIN SMITH	1.25	260.25
43C 130353 00	KARL O GAUSTAD; GOODELL TRUST; WENDELIN L MITCHELL; JAMES JUSTIN SMITH	2.63	260.25
43C 130354 00	KARL O GAUSTAD; GOODELL TRUST; WENDELIN L MITCHELL; JAMES JUSTIN SMITH	1.25	260.25
43C 27166 00	CRAIG G RIEGER	0.05	5.03
43C 30347 00	ANDERSON, MARIE K TRUST; RICHARD M OSTRUM; ROBERT W OSTRUM	4.85	479.63
43C 38075 00	ROBERT L HOLY CROSS; CRYSTAL E HOLYCROSS; JULIUS FAMILY TRUST; WICKER 1977 TRUST	0.47	47.59
43C 38084 00	DANIEL A AADLAND; EMILY M AADLAND	0.37	37.50
43C 38094 00	DANIEL A AADLAND; EMILY M AADLAND	1.90	300.00
43C 38097 00	DANIEL A AADLAND; EMILY M AADLAND	0.38	37.13

43C 130379 00	GERALD E FRYE; TAMARA A FRYE; WENDELIN L MITCHELL	0.08	0.00
43C 30116164	EGGEN INC	0.04	5.90

\*FWP flow rate and volume vary by month, max flow rate and total volume are shown above.

19. Below is a comparison of the physical water supply at the point of diversion to the existing water rights in the area of potential impact over the requested period of diversion.

Table 7.

Month	Physical Availability	Existing Legal Demands	Physical – Legal
July	594.33	330.47	263.86
August	158.23	106.27	51.96
September	67.08	65.87	1.21

Table 8

Month	Physical Availability	Existing Legal Demands	Physical – Legal
July	40,458.60	19,734.19	20,724.41
August	13,690.78	5,948.19	7,742.59
September	7,780.21	3,360.19	4,420.02

20. The physical amount of water available exceeds the existing legal demands throughout the proposed period of diversion.

### CONCLUSIONS OF LAW

21. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

- (A) identification of physical water availability;
- (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
- (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

22. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) (it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007) (permit denied for failure to prove legal availability); see also ARM 36.12.1705.

23. In analyzing legal availability for surface water, applicant was required to evaluate legal demands on the source of supply throughout the "area of potential impact" by the proposed use under §85-2-311(1)(a)(ii), MCA, not just within the "zone of influence." Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6.

24. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992);

25. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 17-20)

### **Adverse Effect**

#### **FINDINGS OF FACT**

26. The Applicant's plan to not create adverse effect is to shut down the diversion if a valid call is made by a senior appropriator. The headgate from the ditch to the pond can be closed and the headgate on East Rosebud Creek can be closed or restricted to reduce flow.

27. The water rights listed in Table 6 (FOF 18) were considered for adverse effect. The amount of water physically available exceeds the flow rate and volume of the water rights in the area of affect throughout the proposed period of appropriation.

#### **CONCLUSIONS OF LAW**

28. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

29. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant



is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(8).

30. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

31. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

32. It is the applicant’s burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

33. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

34. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF 26, 27)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

35. The proposed means of diversion is the existing headgate for the Johnson ditch which has one existing water right, 43C 38094-00. Using Manning’s equation (computations in file under Processing Information & Correspondence flag) the headgate and canal (8-ft. by 3.3 ft.) have the

capacity to carry the additional requested flow. The 48-inch headgate on East Rosebud Creek is currently set at 65% of capacity to divert the existing 1.9 CFS right. Two additional headgates, one on the canal and one adjacent on the reservoir inlet, also allow for control of flow into the pond. A headgate at the outflow will be installed 16-inches lower than the inflow to optimize water transition through the pond and will allow the Applicants to release water to Rosebud Creek as needed.

#### CONCLUSIONS OF LAW

36. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

37. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

38. Whether party presently has easement not relevant to determination of adequate means of diversion. *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989).

39. Adequate diversions can include the requirement to bypass flows to senior appropriators. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena* (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).

40. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 35).

#### Beneficial Use

#### FINDINGS OF FACT

41. The Applicants are requesting 1.2 CFS up to 29.82 AF for fishery and recreation. Fishery and recreation are beneficial uses under the Montana Water Use Act.

42. The requested volume of 29.82 AF includes one fill plus net evaporation. The pond capacity is calculated at 22.32 AF based on a surface area of 3.1 acres, a max depth of 18 ft. and a slope factor of 0.4. The Department calculates net evaporation for applications involving new or existing reservoirs. To determine net evaporation the Department used the monthly evaporation estimates based on data from 1981 through 2010 (inches)(adjusted to 75% of Penman-Linacre in Potts (1988)) for Columbus, MT. Precipitation data was retrieved from the Columbus Montana climate station no. 241938 for the period of record (1930-2012) from the Western Regional Climate Center online at: <https://wrcc.dri.edu/cgi-bin/cliMAIN.pl?mt1938>. The table below shows the mean monthly precipitation and the net evaporation for the proposed reservoir.

**Table 9. Net Evaporation calculation (inches)**

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual Total
Columbus, MT (P/L 0.75)	1.51	1.72	2.61	3.29	4.31	5.2	6.52	6.33	4.80	3.54	2.14	1.43	43.41
Mean Precipitation (inches)	0.55	0.46	0.91	1.65	2.65	2.4	1.04	0.9	1.28	1.22	0.63	0.5	14.21
Net Evap P/L (no ice)	0.96	1.26	1.7	1.64	1.66	2.8	5.48	5.43	3.52	2.32	1.51	0.93	29.2

43. With a surface area of 3.1 acres and 29.2 inches per acre of net evaporation per year, the total annual evaporation will be 7.5 AF ( $3.1 \times 29.2 / 12 = 7.5$ ).

44. The total beneficial use for a reservoir is equal to the beneficial use plus one fill plus evaporation. The proposed beneficial uses are non-consumptive (fishery and recreation), so the beneficial use is  $22.32 + 7.5 = 29.82$  AF.

45. The Applicants cited the Washington Cooperative Extension (file) to show that fish ponds can support 100-200 8-10-inch trout per surface acre. Therefore, the proposed pond should be able to support 300-600 catchable-size trout in Montana. The pond will be aerated to prevent winter kill and the water exchange provided by 1.2 CFS flowing through the pond during the hottest months of the year will help to cool the reservoir. The isolated nature of the pond falls within the current FWP guidelines for preventing stocked fish from entering natural water

bodies. The Applicants also cited “A Guidebook for Montana Ponds” and “A Guide to Building and Managing Private Fish Ponds in Montana,” Montana Watercourse and Montana Fish Wildlife and Parks publications, respectively, in their beneficial use addendum.

46. The amount of water requested also supports recreation uses such as swimming, fishing, canoeing, outdoor enjoyment, wildlife viewing and hunting. Traditional swimming pool sizes vary. Typical home swimming pools are around 20 ft. wide by 40 ft. long with a surface area of 0.018 acres (Jobe 2016 – File citation) and Olympic swimming pools are 50 m long by 25 m wide with a surface area of 0.31 acres (Hoefs 2013 – File citation). With a surface area of 3 acres the proposed pond will provide a water body of a suitable size for swimming. The pond needs adequate size and depth to allow for circulation to prevent excess plant, bacterial and algae growth (EPA 2016 – File citation).

47. The 3-acre surface will allow space for a 14 to 17.5 ft. canoe to maneuver without conflicts with other users and wildlife.

48. The depth of the pond and water cycling will ensure the pond does not become eutrophic or marshy. See file (SW.9.A addendum) for full list of publications cited.

### CONCLUSIONS OF LAW

49. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.

50. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by*

*Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

51. Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

52. It is the applicant's burden to produce the required evidence. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also Royston; Ciotti.

53. Applicant proposes to use water for fishery and recreation which are recognized beneficial uses. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence fishery and recreation are beneficial uses and that 29.82 AF of diverted volume and 1.2 CFS of water requested are the amount needed to sustain the beneficial uses. § 85-2-311(1)(d), MCA. (FOF 41-48)

### **Possessory Interest**

#### **FINDINGS OF FACT**

54. The Applicants signed the application form affirming the applicants have possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

#### **CONCLUSIONS OF LAW**

55. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a

point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

56. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

57. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 54)

### **PRELIMINARY DETERMINATION**

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 43C 30151928 should be GRANTED.

The Department determines the Applicant may divert water from East Rosebud Creek, by means of a headgate, from July 1 through September 30, at 1.2 CFS up to 29.82 AF, from a point in Tract A Aspen Meadows Ranch Subdivision in Government Lot 9, Sec. 35, T4S, R18E, Stillwater County for fishery and recreation use from January 1 through December 31. The place of use is a reservoir located in Lots 3 and 4 COS 355737 Aspen Meadows Ranch Subdivision in the NWSW and SWNW Sec. 25, T4S, R18E, Stillwater County.

**NOTICE**

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 29th day of November 2021.

/Original signed by Mark Elison/

Mark Elison, Manager  
Billings Regional Office  
Department of Natural Resources and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 29th day of November 2021, by first class United States mail.

LINCOLN AND JUDITH POWERS

4185 OBIE LANE

BILLINGS, MT 59106

[LINCOLNPOWERS@GMAIL.COM](mailto:LINCOLNPOWERS@GMAIL.COM)

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CHRISTINE SCHWEIGERT

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DATE